PRIVATE AND INTERNATIONAL LAW IN THE ENFORCEMENT OF CLAIMS

By Clifford Stevens Walton, Esq.

Washington, D. C., Licentiate in Civil Law; formerly Counsel on the Chilean, Salvadorean and other International Claims Commissions

In the brief consideration of such a technical and far-reaching subject as the present one, the logical order of outlining something of the procedure of leading countries in the treatment of domestic and international claims is manifest before referring to such claims in international arbitrations. Inasmuch as the laws and procedures of Spanish-American countries are based on, and follow to a great extent those of European civil law countries, it has been found convenient to refer hereafter to the jurisprudence and procedures of such countries by way of illustration.

Claims in the United States.—Claims against the United States are examined either by officers in the departments of the government, by committees of Congress, by the Court of Claims, by special courts, by domestic commissions or by mixed commissions, under treaties with foreign nations. The officers of the several departments of the government examine the ordinary claims for salaries and other expenses of the government, after which they are reported to the proper offices of the Treasury Department and paid out of appropriations made from time to time by Congress. Claims may be presented in either house of Congress by petition or by bills introduced by members. These are generally referred to appropriate committees and by them examined, and then a report is made to the house in which the claim was presented, and if in favor of the claim, with a bill or joint resolution for an appropriation to make payment, which is considered and passed or rejected as other private bills. Sometimes the bill refers the examination of the claim to the Court of Claims or it is presented before a special court or before a domestic commission, created for the purpose.

The Court of Claims renders judgment, subject to an appeal to the Supreme Court of the United States on questions of law in which final judgment is rendered, and these judgments are regarded as

conclusive and paid without examination by appropriations made by Congress. An examination of the United States statutes will show the jurisdiction exercised by officers of the departments, the Court of Claims, special courts and domestic commissions, in the examination, and the mode of procedure authorized by law.

Mixed commissions, under treaties, exercise jurisdiction in such mode as the treaties provide, aided by such legislation of Congress as may be necessary, and their awards are paid by foreign governments or by appropriations of Congress, as the case may be. The organic act of 1855 gave to the Court of Claims jurisdiction to hear and determine "all claims founded upon any law of Congress or upon any regulation of an Executive Department, or upon any contract, expressed or implied, and all claims which may be referred to it by either house of Congress."

By the act of March 3, 1863, a limitation as to time was provided for filing claims in this court and this same act also had a proviso in respect to all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatever on the part of the government against any person making claims against the government in said court. Other amendments have been made from time to time which are not material in this connection and may be found in the revised statutes, except the provision as to aliens. Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, have the privilege of prosecuting claims against the United States in the Court of Claims whereof the court, by reason of their subject-matter and character might take jurisdiction. It has been judicially determined by decisions already made, that under this proviso the right to sue in this court is accorded to citizens of many foreign countries. In Brown *v.* the United States, decided in the Court of Claims, May 22, 1871, Nott, J., said:

"Our popular orators and writers have impressed upon the public mind the belief that in this republic of ours private rights receive unequaled protection from the government; and some have actually pointed to the establishment of this court as a sublime spectacle to be seen nowhere else on earth. The action of a former Congress, however, in requiring (Act xxvii, July, 1868, 15 Stat. L., p. 243) that aliens should not maintain certain suits here unless their own governments accorded a corresponding right to citizens of the

United States, has revealed the fact that the legal redress given to a citizen of the United States against the United States is less than he can have against almost any government in Christendom. The laws of other nations have been produced and proved in the Court of Claims, and the mortifying fact is judicially established that the government of the United States holds itself, of nearly all governments, the least amenable to the law."

In England aliens have a remedy "by petition of right," regulated by Acts xxiii and xxiv Victoria, July 3, 1860, and subsequent amendments. (U. S. *v.* O'Keefe, 11 Wall. 179; Carlisle *v.* U. S., 16 Vol., p. 148. See Whiting's War Powers of the President, 51; the Venus, 8 Cranch; the Hoop, 1 Rob. 196; the Army Warwick Sprague, J.)

In Foreign Countries in General.—Foreign nations, almost without exception, have given to aliens, including citizens of the United States, the right to go into their courts, and have an adjudication of their claims upon such nations. This is well shown in the case of Fichera *v.* the United States, 9 Court of Claims R., decided in 1873, in which Nott, J., said:

"The only question presented in this case is whether under the Italian law an American citizen may maintain an action against the government of Italy, and we have already found the perfected justice of the civil law made the government in matters of ordinary obligation, subject to the suit of the citizen, in the ordinary tribunals of the country. We have found this right to be preserved under modern codes in Prussia, Hanover and Bavaria (Brown's case, 5 C. Cls. R., p. 571); in the republic of Switzerland (Lobsiger's case, id., p. 687); in Holland, the Hanseatic provinces and the free city of Hamburg (Brown's case, 6 C. Cls. R., p. 193); in France (Dauphin's case, id., p. 221); in Spain (Molina's case, id., p. 269); and in Belgium (De Gives's case, 7 C. Cls. R., p. 517)."

According to the laws of *France* an action may be brought against the state by a private individual either before the civil or administrative tribunals, according to the nature of the case. If the state is sentenced to pay a sum of money, such sum is taken from the budget of expenditures, and as it is the duty of the legislative branch to vote the budget, it follows that the legislative branch really provides for the payment. Claims against the state brought before the courts constitute what it is customary to call *"actions contentieuses"; i. e.*, actions in which it is presumed that a right, in the judicial sense of the word, is claimed. In other cases it happens

that individuals *whose interests have suffered some detriment* bring claims against the state, either addressing the administration directly or the legislative branch. If the admission of these claims involves the payment of pecuniary indemnities, it is the duty of the legislative branch to provide for the payment in case no appropriation has previously been made to meet these expenditures. There is no special mode of procedure before the legislative branch. Claimants may present petitions, or deputies, either in their own name or in the name of the parties interested, may introduce measures before the legislative branch; or the government itself may bring in a bill.

If a petition is presented, the assembly, in case of its admission, refers it to the ministry having jurisdiction in the matter to which the petition refers. If a motion is made or a bill presented, the examination thereof is referred to a commission, which makes its report, and the assembly passes a vote of approval or rejection. In the first case the law which is passed regulates the fundamental points of the right to indemnity and the details of execution. In general, the legislative branch does not decide as to the admission or rejection of the claims which the parties interested may have to present in execution of the law; the legislative branch generally leaves this to be done by administrative commissions, after it has prescribed the principal rules or mentioned the general conditions which are to be fulfilled.

As examples of this may be cited the following:

The law of September 6, 1871, established the principle of solidarity, in accordance with which the legislator designed to cause the whole nation to aid in making good the material damages of all kinds caused by the war. This law allowed, provisionally, the sum of 100,000,000 francs to be distributed among the invaded departments; and also, the sum of 6,000,000 francs, which latter was specially appropriated to the payment of *damages caused by the reinstatement of the lawful power in Paris after the insurrection of the commune.* The most liberal spirit presided over the application of the principle of indemnification. No distinction was made on account of the causes of the damages. All persons who had suffered material losses in consequence of the war were allowed to present their claims, whether for war contributions, fines, or anything of the kind.

The law of the twenty-eighth of July, cited, closes the series of relief measures which the assembly and the government were led

by a spirit of justice and a humane policy to adopt. After the passage of these three laws, it may be said that there is no kind of damage resulting from war for which relief has not been granted, if not in full, at least in a certain measure, and that without respect of persons. Foreigners, Germans as well as others, were allowed to receive a share of the indemnities granted, whether these had been appropriated to the reparation of losses resulting from the war, properly so-called, or to that *of losses caused by the insurrection of the commune.*

France has always taken the most liberal standpoint in granting indemnities after civil wars. Thus it was that a law of December 13, 1830, supplementary to the law of the thirtieth of August preceding, placed the sum of 2,400,000 francs to the credit of the government for the purpose of indemnifying the sufferers by the July revolution. Another law, of December 24, 1851, appropriated 5,600,000 francs to the relief of the persons who had suffered damages to their property in consequence of the revolution of February, and the revolution of June, 1848. In all these cases, foreigners, as well as French citizens, were permitted to enjoy the benefits of the measures of relief which were adopted.

The law of the tenth of Vendemiaire, year IV, rendered the communes responsible for acts of violence committed in their territories *by mobs and armed or unarmed assemblages,* as well as for reparation of the damages resulting therefrom. The benefits of this law were intended for foreigners as well as for native citizens.

Liability under the Civil Law.—The jurisprudence of Spanish America is based largely upon that of the European civil law and in respect to such claims it is well illustrated in Brown's case (5 C. Cls. R., p. 571), by a distinguished historical writer, Mr. Frederick Kapp, who, as a witness, stated that this liability of a government under the civil law is not a device of modern civilization, but has been deemed inherent in the system, and has been so long established that, to use the phrase of the common law, "the memory of man runneth not to the contrary." Therefore it is to be expected that in *Italy,* the seat of the fountain of the civil law, this same liability is to be found existing. The civil code of the kingdom of Italy of 1866 recognizes, rather than establishes, the fundamental principle of liability, but it expressly provides (Article 10) "That in suits pending before the judicial authority between private persons and the

public administration, proceedings shall always take place formally at the regular session." It is also provided by the third article of the same code that "The alien is admitted to enjoy all the civil rights granted to citizens." These provisions established the right of an Italian citizen to maintain his action in the United States Court of Claims, within the meaning of the act of July 27, 1868 (15 Stat., p. 243, sec. 242), which prohibits the subject of a foreign government from maintaining a suit for captured property, unless "the right to prosecute claims against such government in its courts is reciprocal, and extends to citizens of the United States."

Generally in foreign countries, the state is represented in its pecuniary capacity as the representative of money and property affairs by an officer called the *fiscus*. The power to maintain such a suit is considered a matter of absolute right. Suits in relation to state property, in which the *fiscus* is either plaintiff or defendant, are treated and decided like suits among private parties and all the consequences of defaults and executions take place against the *fiscus*. The *fiscus* is brought into court by the service of summons and complaint upon the fiscal attorney. The fiscal attorney is to answer similarly to any other party and bring his proof. Judgment rendered against the *fiscus* may be satisfied and discharged in the usual way, by execution. (See Brown's case, 5 C. Cls. R., p. 271.) In Bavaria the redress is substantially the same (Muller's case, 6 id.). In the republic of Switzerland the federal tribunal takes cognizance of suits between the confederation, on the one side, and corporations or individuals on the other, when these corporations or private citizens are complainants and the object of the litigation is of the value of at least 3,000 francs (Law, fifth of June, 1849). In the Netherlands, in the German Empire and generally in all countries which have inherited the perfected justice of the civil law, the government is in legal liability thus subject to the citizen. Even in France, under the late empire, there was a less circumscribed means of redress, a more certain judicial remedy, a more effective method of enforcing the judgment recovered, than has been given to the American citizen, notwithstanding the pledge of the constitution. Of all the governments of Europe, it is believed that Russia alone does not hold the state amenable to the law in matters of property.

In respect to the Spanish law it appears that the right of an alien and of a Spanish subject to appear before the courts of

law generally, and bring all manner of actions, whether against the government, or against all other persons and corporations, is precisely the same. The Spanish law makes no distinction in this respect between aliens and subjects (See Spanish Constitution, Art. 2; Civil Code, Art. 27; Civil Procedure, Arts. 69-70, and *Ley de Extranjeria*); all alike have the right to claim against the action of the government, and to procure redress whenever the action of the government or any of its officers is claimed or pretended to be, in violation of written law or in violation of contracts entered into by the government.

In Spanish America.—In respect to the procedure in Spanish America the liberal provisions of the Argentine Republic may be cited by way of illustration. In this republic every claim is presented to the executive and proper department, according to its nature. It must be substantiated by the report of that department which may be acquainted with its antecedents, and with the opinion of the attorney of the treasury or the attorney-general of the nation. The executive can also ask for all the data, reports or testimony that may be considered necessary to establish the truth of the alleged facts. In this respect there is no law whatever establishing a fixed form of procedure. If the executive finds the claim admissible, and there exists in the general budget of the administration or any special laws authority to make payments of the nature of the claim, he then orders its payment by the finance department, charging it to the budget or the special law, as the case may require. If there should be no authority in law to make such payments, then the case is passed to Congress, accompanied with a bill to vote the necessary funds to meet the payment. Congress studies the claim anew and if found admissible, accepts the bill submitted by the executive. If the executive finds the claim inadmissible, he rejects it. In this latter case the interested party sometimes presents himself direct to Congress, complaining of the decision of the executive, and asking that by a special law the payment may be ordered for the amount claimed. The provision of the constitution on the subject is as follows:

"Art. 20. Aliens enjoy in the territory of the republic all the civil rights that citizens do. They can follow their occupation or profession, possess, buy, or sell real estate, navigate the rivers and coasts, exercise freely their religion,

testate and marry according to its laws. They are not obliged to become citizens, or pay extraordinary or forced contributions.

"From these primordial rights given by the constitution to foreigners spring all the rights that are correlative to them, and, among others, *the right of suing or being sued by any individual, native or foreign, before the courts or the government,* in the cases and conditions before mentioned, or in any civil or criminal suit that originates from the exercise of the rights above mentioned, or for the violations of said rights. Furthermore, when a question arises between a foreigner and a native, they are not obliged to submit to the local tribunals, but either of them can oblige the other to appear before the federal tribunals of the nation. This right does not exist when the question is between two foreigners or two natives, in which case they are obliged to submit to the decision of the province in which they reside.

"The resident foreigner and the temporary sojourner have equal rights in law. The only difference, therefore, between a citizen and an alien in the republic is, that the latter cannot be an elector for members of any of the three highest positions in the nation, nor can he, on the other hand, be obliged to perform military service, or pay extraordinary obligatory contributions."

Claims under International Law.—Upon the grounds of public policy, many governments exclude contractual claims from international arbitrations. One reason for this appears to be that persons going into a foreign country for business purposes and making contracts there are supposed to take knowledge of the customs, laws and procedure in such cases and to contract with their eyes open. This is especially true with respect to common law countries that the *lex loci contractus* is to govern, where the contract is to be carried out in the place or country where it is made. In civil law countries it is held that the domicile ought to govern in regard to the capacity of persons to contract. There is, however, much conflict of opinions on this general subject both in common law and civil law countries, which are determined by the peculiar facts in each case and must be taken into consideration in this connection. Lord Palmerston and some other authorities have proclaimed that notwithstanding it is generally contrary to public policy to enforce contractual claims against foreign governments, still, that the state in its sovereign capacity has that right reserved if it sees fit to enforce it, and cases are apt to be more frequent of the exercise of this right where claims are prosecuted independently through diplomatic correspondence or by means of reciprocal agreements under treaties. As examples of this may be cited the following cases: Hilton *v.* Guyot, 159 U. S. 114, which was a contractual case in which a judgment

was obtained in the French courts against citizens of the United States, which judgment was attempted to be enforced in the courts of this country without success and in which it was held that:

"A foreign judgment for money in favor of a citizen of the foreign country against a citizen of this country, rendered by a competent court having jurisdiction of the cause and of the parties, upon due allegations and proofs and opportunity to defend according to the course of a civilized jurisprudence, whose record is clear and formal, is *prima facie* evidence, at least, in a suit upon it in this country, and is conclusive on the merits, unless impeached on special ground, or shown by international law or the comity of this country not entitled to full faith and credit.

"Judgments rendered in a foreign country, by the laws of which our judgments are reviewable on the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are only prima facie evidence of the justice of the plaintiff's claim.

"In the absence of statute or treaty, the comity of this country does not require that judgments of a foreign country be recognized as conclusive in this country, where such foreign country does not give like effect to our own judgments."

And the case of Perez Triano & Company, where judgments were obtained against a Colombian in England and the United States, and were found to be enforceable in Colombia in view of a reciprocity clause in a treaty made between the two countries.

Domestic Commissions.—Domestic commissions, appointed to decide international claims, heretofore have not proven entirely satisfactory. This may be accounted for to some extent on account of the one-sided constitution of such commissions, which leads the commissioners to overlook or disregard the rules of foreign countries in respect to evidence and procedure and, aside from political and national prejudices, the natural tendency of such commissioners to follow too much the technical rules of the courts of their own countries, and the result has been that instead of doing justice there have been imposed such impracticable conditions as to amount almost to a denial of justice. This is evident when one examines the proceedings of a mixed commission, made up of members from different foreign countries, whereby any efforts of the commissioners of any particular countries to impose their rules of evidence and procedure, as rules par excellence, upon the commissions, have been warmly combated, resulting in broad equitable rules being adopted

generally, whereby a cardinal principle of *getting at the truth by any fair means has been the first consideration.*

It is hardly necessary to state that common law procedure is but a mere infant compared with that of civil law countries which is to-day in force in many of the leading countries of the world, and while many features of the common law system are highly commendable, still the evils of others, like *too much cross-examination, confusing and misleading witnesses on the witness-stand, and the arbitrary exclusion of testimony on the grounds of leading questions* (which latter practice courts are modifying; see, *Rowe* v. *Godfrey,* 16 Me. 128; *Funk* v. *Babbitt,* 156 Ill. 408; 20 C. of A. D. C., 559), are well recognized among the members of the bars of this country, and it is extremely doubtful if in the prosecution of international claims such practice can ever be justly enforced, except to a limited extent, in foreign territory where a foreign language is spoken and the civil law prevails.

This is a problem which now confronts the Spanish Treaty Claims Commission at Washington, the first commission which has ever gone to such extremes, and it is believed that unless a broad view is taken of the situation, the results will be disastrous and anything but praiseworthy.

Arbitrary Practices.—Some Spanish-American countries like Chile, Salvador and Venezuela, at different times, have enacted laws requiring foreigners to resort to local courts for determination of their claims and have attempted to deny such foreigners the right of resorting to their own governments, either directly or by means of reference to international arbitration, unless such claims were first established in the local courts. Such arbitrary requirements are now quite generally recognized as contrary to international law, especially where there is local prejudice, where claimants are in foreign territory or where the local courts are mal-administered (See North and South American Construction Company *v.* Republic of Chile, case 7, U. S. and Chilean Claims Commission; El Triunfo *v.* U. S., No. 1, U. S. and Salvador Arbitration).

Mixed Commissions.—Claims prosecuted internationally under mixed commissions are restricted by conventions and rules of practice based thereon, consequently governments do not have the same latitude under such commissions as they do where cases are enforced through diplomatic correspondence alone. As a rule, contractual

claims are excluded from adjudication by express terms in conventions or treaties made between the governments interested and other limitations are often imposed in regard to filing such claims and forever barring claims which are not filed within a stated time. As an illustration of such conventions may be cited the conventions celebrated between the United States and Chile, August 7, 1892, and May 24, 1897, as to claims arising from acts committed by the civil or military authorities of either country, and which were to be a final adjudication and settlement of all claims between the said countries prior thereto. The language of article 1 of the convention of 1893 is similar to that of other conventions, and is as follows:

"All claims on the part of corporations, companies or private individuals, citizens of the United States, upon the government of Chile, arising out of acts committed against the persons or property of citizens of the United States, not in the service of the enemies of Chile, or voluntarily giving aid and comfort to the same, by the civil or military authorities of Chile; and on the other hand, all claims on the part of corporations, companies or private individuals, citizens of Chile, upon the government of the United States, arising out of acts committed against the persons or property of citizens of Chile, not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the government of the United States, shall be referred to three commissioners," etc.

And Article 9:

"The high contracting parties agrée to consider the result of the proceedings of the commission provided by this convention as a full, perfect, and final settlement of any and every claim upon either government," etc.

The Hague Tribunal and the Second Pan-American Conference. —The convention for the pacific settlement of international disputes, concluded and signed July 29, 1899, at The Hague, included only two powers of the western hemisphere, namely, the United States of America and the United Mexican States.

At the second Pan-American Conference, held in the city of Mexico, the principles set forth in the three conferences held at The Hague were recognized as a part of public international American law, and on January 15, 1902, were subscribed to by the delegates of the Pan-American countries, with the exception of Brazil, Chile, Ecuador, Venezuela and Cuba (then not independent):

On January 29, 1902, a treaty was agreed to for compulsory arbitration, excepting questions of independence and national honor, matters in controversy to be submitted either to The Hague or to a *special tribunal* (under special procedure to be agreed upon). Independence or national honor was stipulated not to be involved in controversies with regard to diplomatic privileges, boundaries, rights of navigation and validity, construction and enforcement of treaties (Articles 1 and 2).

This compulsory arbitration treaty led to much controversy which at one time threatened the dissolution of the congress; however, this treaty was finally subscribed to by the delegates from the Argentine Republic, Bolivia, Dominican Republic, Guatemala, Salvador, Mexico, Paraguay, Peru and Uruguay.

On January 30, 1902, the Pan-American delegates, excepting those from Brazil and Venezuela, agreed to a treaty for the arbitration of pecuniary claims, *i. e.:*

> "to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens, and which cannot be amicably adjusted through diplomatic channels, and when said claims are of sufficient importance to warrant the expenses of arbitration." (Art. 1.)

Such claims were agreed to be submitted to The Hague Tribunal unless both parties should prefer a special tribunal with special procedure (Article 2). This treaty is not obligatory except as to those who have subscribed to The Hague Convention, and as to those who have ratified the convention and upon those who ratified the protocol for their adherence to the conventions signed at The Hague, July 29, 1899, and shall be in force for a period of five years. Under these various conventions and treaties, which are more or less intimately connected, a broader jurisdiction is opened for the adjustment of international differences and claims which, it is believed, will insure more complete justice and satisfaction than has been heretofore accomplished, as many of the petty restrictions and limitations which are to be found in arbitration conventions previously held will be put aside, and the general result will be undoubtedly a better understanding among powers of those broad and liberal principles of equity and justice which will tend towards the compilation of codes of international public and private law for the use of the civilized world.